STATEMENT OF

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BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HEARING ON

IRAQ RECONSTRUCTION: RELIANCE ON PRIVATE MILITARY CONTRACTORS

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Introduction

Mr. Chairman, members of the Committee, thank you for the invitation to testify today at your hearing titled "Iraq Reconstruction: Reliance on Private Military Contractors." My name is Alan Chvotkin, and I'm the senior vice president and counsel for the Professional Services Council (PSC).

The Professional Services Council is the leading national trade association representing hundreds of companies of all sizes that provide professional and technical services to the federal government, including information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific, and environmental services.

Many of our member companies are operating in Iraq under contracts awarded by numerous departments and agencies of the U.S. Government; these firms are purchasers of security services and we have worked with them to highlight and address their concerns about the contracting process in general and the security regime in particular. In addition, several of our member companies provide security services to firms in Iraq, in the U.S. and around the globe. Some also have contracts directly with the U.S. Government. As such, we know their concerns as service providers and have been working with them on a myriad of issues raised by their activities, as well.

We share the outrage at some of the events taking place in Iraq. However, we must be realistic about the circumstances in which the events are taking place and about the options that may be available to address them. Similarly, we must be cautious in identifying politically expedient solutions that do not fully address even the symptoms let alone the root causes of the concerns being raised. And we must be extremely cautious when developing solutions to perceived past errors so as not to create unnecessary constraints on future events.

We also share the outrage at the unfortunate loss of life in Iraq. Thousands of American troops have been killed in the line of duty and many thousand more wounded. According to the U.S. Department of Labor, more than 800 U.S. contractor employees have also been killed while performing their work, with several thousand more wounded. Yet we must be realistic about the missions they are asked to perform and the risks that all who are working in that hazardous environment take on a daily basis.

PSC Partnership with Federal Agencies

Over the past several years, PSC has had extensive interactions with the Department of Defense, including particularly with the Offices of the Under Secretary of Defense for Acquisition, Technology and Logistics and the Assistant Secretary of the Army for Acquisition, Technology and Logistics, and with the Army Materiel Command (AMC), who is the Defense Department's lead for Iraq. In 2004, we conducted an extensive "lessons learned" project with the Army Materiel Command staff with the support of and guidance from the former AMC Commander. We have also worked closely with the Department of State, USAID and other agencies on their Iraq initiatives and their policies and practices affecting our member companies.

Finally, PSC was pleased to have partnered with the Special Inspector General for Iraq Reconstruction (SIGIR) on his comprehensive activities, including serving as the only private sector organization that participated in his three-part "lessons learned" project.

Iraq: A Unique Foreign Policy Event

To begin with, there must be an acknowledgment and clear understanding that Iraq is a unique foreign policy event in our nation's experience. To our knowledge it is the first time that the U.S. Government has attempted three simultaneous activities in a confined geographic area: a military action, a massive reconstruction effort across ten major sectors, and an extensive developmental assistance initiative. There was a massive surge of resources into Iraq, often in uncoordinated or overlapping activities, that led good people with good intentions to make their best judgments under trying circumstances in the middle of a war zone!

Hiring private security support is common for many of our companies who are routinely engaged in reconstruction and developmental assistance overseas, so Iraq is not new in that regard. However, it is obvious that Iraq has been, and continues to be, a very dangerous place to live and work, particularly for those individuals and organizations associated with the U.S. Government, and has presented incredible challenges and problems.

Over time, the contracting environment in Iraq has also changed. At the outset of the war, the initial approaches were emergency, short-term focused. In fact, the clear U.S. Government Iraq policy was to approach requirements as short-term directives; 90 day terms were not uncommon. As we've moved from emergency contracting through "contingency" contracting into sustainment contracting, the contracting process has stabilized and slightly improved.

Stewardship of Funds Spent

While we share the outrage about the dollars spent in Iraq for the results achieved to date, we must also be realistic about the reasons for the dollars spent and the results achieved. In the contracting environment, for example, the U.S. Government made a conscious decision to be a good steward of the contracts awarded and applied the full scope of the federal acquisition regulations – the FAR – to the preponderance of the contracts awarded there. But the FAR, for all its provisions and authorities, is still not as flexible as it needs to be for addressing the emergency needs of the initial wave of awards or to adjust these contracts to rapidly changing circumstances.

As a good steward of the health and safety of all workers in Iraq, the U.S. Government made a conscious decision to impose U.S. health and safety requirements on its contractors. To be a good steward about the potential impact of our work in Iraq, the U.S. Government also made a conscious decision to require its contractors operating in Iraq to have liability insurance. Each of these steps, in isolation, may have been the right decision for the right reason and we don't have any objection to the Government imposing such requirements on the contractor community in a planned and consistent manner. But even the simple act of imposing these additional contractual requirements increases the cost of contract performance. So every dollar awarded by an agency or spent by a contractor because of these contractual requirements is not "waste" or an "abuse" as is commonly reported.

U.S. Government policy also sought to involve the Iraqi people – but only the non-Baathist Iraqis – in the reconstruction efforts. Thus, many of the U.S. Government's contracts required contractors to utilize Iraqi and other coalition partner businesses as subcontractors and to use Iraqi labor in the performance of work. This presented some special opportunities and significant challenges for contractors and higher-tier subcontractors that has had a direct impact on cost, transparency, performance and accountability.

Work in Iraq also presents special issues and challenges because of the number of projects the U.S. Government has contracted for and that are underway simultaneously; the number of contractors, employees and facilities that are operating, including the need for personnel and property security support; and the evolving and deteriorating security situation where the work is to be performed. There continues to be resource challenges of federal employees and more oversight reviews than officials with the warranted authority to commit the U.S. Government. We have also seen changes imposed without meaningful consultation or much attention to the direct and indirect consequences of such actions.

Accountability

We share the outrage about the appearance of a lack of accountability for certain behaviors in Iraq and strongly endorse holding all participants in the contracting process equally accountable for their responsibilities. We strongly support a robust oversight function to hold all parties accountable for their performance; where fraud is found, we strongly support a vigorous prosecution. But we must be realistic about the activities that are actually taking place and the root cause for them; we must also look to isolate the limited number of adverse events from the overwhelming number of successful efforts. In fact, in the January 2007 quarterly report, the SIGIR has said that "fraud has not been a significant component of the U.S. experience in Iraq." These requirements clearly drove some of the very contracting behaviors, such as the issue of tiering that are being highlighted today. But tiering by itself does not equate to "waste" or "abuse." It starts as a contracting issue based on the requirements identified by the U.S. Government; tiering is also a business issue based on how individual companies chose to propose their solutions to the government and to subsequently execute that work.

Role of Contractors

Companies don't set the mission. The nature of the contracting arrangements in Iraq – particularly at the earliest stages of the war – was driven exclusively by the government's choices and the government's requirements. So while it is legitimate to discuss the appropriate roles and assignments of contractors, the use of code words masks the real issues and diminishes the opportunities for serious discussion. Contractors are playing critical roles in each of the concurrent operational areas taking place in Iraq today. It would be impossible for the U.S. Government, even with its coalition partners, to execute the number and scope of projects underway without contractors.

And while we share the concern about the role of private security companies operating in Iraq, the reality is that the environment and nature of the relationship between the U.S. Government and its contractors requires their presence. Only for those contractors who are providing support to the military and are directly "accompanying the force" is the military even tasked with the responsibility for providing force protection for people and property; in many instances, the

military is not able to fully carry out that responsibility. Thus, private security firms are an essential adjunct to the U.S. companies executing some direct support contracts and for all other contracts for U.S. Government agencies. Of course, these private security firms are also employed by organizations in Iraq who are not under contract to the U.S. Government; these may include firms supporting other coalition partners' initiatives and non-governmental organizations.

The need for private security firms is also driven by the projects that are, of necessity, being undertaken by U.S. firms outside the Green Zone and other military-fortified areas. In fact, it is impracticable for the military to provide force protection for all of these activities. Indeed, some of the government agencies, contractors and non-governmental organizations don't believe that they can effectively carry out their contractual work if the U.S. military provides the visible security support.

Security Costs

We share the outrage about the cost of security but we must be realistic about the factors that are driving such behaviors. For example, while many are properly concerned about the share of appropriated funds now being allocated to security costs – security for employees and their work sites is of primary concern to the contractors who are there and we are all well aware of the increasingly dangerous security situation in Iraq.

As I noted earlier, there are three categories of U.S. government contracts that have been awarded work in Iraq. The first are those awarded contracts by the Defense Department to directly support the military's activities, i.e., the contractors that "accompany the force." These include the systems and logistics support contracts whose work is only performed because the military is operating in that area.

For these contractors, force protection and other life cycle support functions have traditionally been the responsibility of the U.S. military. We strongly support that formulation. But in a significant and little discussed June 16, 2006 change to the Defense Department's acquisition regulation supplement, the Defense Department has made force protection the primary responsibility of the contractors performing contracts in these hazardous environments unless the military accepts that responsibility directly in the contract. We strongly opposed that reversal of policy and our companies are now adjusting to it, including addressing the costs of performance to reflect these changes.

For contractors who are supporting the reconstruction activities or are under contract from any other federal agency, force protection has traditionally been the responsibility of the contractor performing that work; a July 18, 2006 proposed FAR regulation has reconfirmed that U.S. Government policy is to impose this responsibility and expense on contractors. We understand and support that policy formulation. So while we can be outraged about the security instability in Iraq and the cost of security spent by contractors to support their activities there, we must be pragmatic about understanding why those costs are being incurred and the circumstances that are driving such costs.

Most U.S. contractors working in Iraq are not security companies. Thus, private security firms must provide personal security for employees, housing locations and work sites for contractors that are providing services other than security. They coordinate and provide security for the transportation of key company personnel and resources and coordinate with government officials when their clients require interaction for official government business.

It is understandable why many of the sources and methods of these private security firms are confidential. By and large, it is our experience from our PSC member company firms' that contracting for these security services have been sound and, more significantly, effective. However, the experience of our member companies, who are among the most sophisticated in the international reconstruction and developmental assistance communities, may not be typical of all firms that contract for security services in Iraq. Factors such as cost, availability, scope of the security responsibilities and others also factor into the decision of whether to contract for such services and from whom to obtain them.

To the extent possible, these private security firms also routinely seek to coordinate with the U.S. military on the overall security threat environment. Yet only in the past year has the U.S. Government established reconstruction operations centers in Iraq that provide a formal channel for such coordination, on a voluntary basis. In fact, one of the key "lessons learned" from our Army Materiel Command effort was the fact that contractor force requirements were not integrated into the military planning process. Even within the military contracting process for contractors accompanying the force, where DoD policy dictates that the government contracting officer is required to validate any force protection requirements and provide that information to the geographic combatant commander, we found too many examples where these procedures were not followed. Indeed, in many instances, the roles, numbers, and life support needs of those contractors accompanying the force were not fully addressed.

The number and scope of the projects in Iraq, the need to attract, retain and employ personnel who are "on their own" for force protection, and the highly variable security environment forced contractors to put a premium on hiring skilled, trained and well-managed security services. Thus, from almost the outset of this Iraq conflict, the Professional Services Council strongly recommended that the U.S. Government and the Defense Department, in particular, adopt a non-traditional role with respect to private security firms.

In March 2003, PSC recommended to the senior acquisition leadership of the Department of Defense, through the Defense Acquisition Excellence Council, that DoD consider implementing at least one of three initiatives: setting standards for the private security firms who wanted to operate in Iraq; or better yet, establish a qualified list of firms from which the private sector could contract directly for services needs; or even better still, that DoD directly contract for and supervise these private security firms that the contracting firms would reimburse. The essence of this recommendation was included in the Government Accountability Office's (GAO) July 2005 report: "Rebuilding Iraq —Actions Needed to Improve Use of Private Security Providers (GAO 05-737; 7/28/05). While U.S. Government agencies raised valid reasons why they did not concur with these recommendations, there was a missed early opportunity for the government to address what we feared would become a significant and growing challenge.

The Importance of Advance Planning and Coordination

Our lessons learned efforts with both the Army Materiel Command and the Special Inspector General for Iraq Reconstruction highlighted the lack of advance planning for the security needs of those U.S. Government organizations responsible for non-DoD contracts to support either reconstruction or developmental assistance. The most significant portion of the State Department's December 22, 2004 revision to their acquisition regulation proposed new coverage requiring State Department contracting officers to address the administrative, logistical and security support to contractors performing overseas in "high-risk" activities.

The proposed rule explicitly states that contracts performed under Department of State contracts outside the United States "may be inherently dangerous" and that, unless specified in the contract, the contractor is responsible for all administrative, logistical and security support required for contractor personnel engaged in this contract.

While our members understand and accept the fact that they are responsible for these functions, PSC strongly opposed this portion of the State Department's initiative in our February 22, 2005 written comments (available on the PSC website at www.pscouncil.org), in part because the rule failed to provide necessary flexibility to address the real-world situations that were then obvious in Iraq and elsewhere. This State Department rule was replaced by the July 18, 2006 FAR rule and the supplemental DFARS rule.

In-country coordination and communication is essential. It must be a two-way effort and there is every reason for the government to take advantage of the information that these companies have about the security situation in various parts of the country. Over time, despite the lack of any formal methodology or doctrine, many firms have created informal mechanisms to assist them in getting the job done as effectively and as efficiently as possible.

Contractor Liability

Beyond the risk associated with these security arrangements, contractors and private security firms face significant legal challenges from third parties. Some of these cases arise out of the actions by contractors accompanying the force; others are the result of injuries suffered by others as a result of the security situation in Iraq. Each death is tragic and our thoughts and prayers go out to the families of all of those who have been injured or killed while supporting the U.S. activities in Iraq. We have tried to address this important liability issue from a variety of perspectives.

First, we looked at the current regulatory scheme for third-party liability while performing government contracts. PSC identified a problem with respect to third party liability arising from litigation brought in the United States based on acts or omissions of contractors supporting U.S. and Coalition forces overseas under fixed-price contracts. Third parties potentially subject to inadvertent injury or death include host country citizens, third country nationals, personnel of other contractors, and even uniformed and civilian members of the U.S. and Coalition forces.

Performing what may be considered routine work in the U.S. becomes significantly more dangerous and often uninsurable when performed overseas in a theater of military operations. The Air Force recognizes this heightened risk in its published guidance regarding contractors accompanying a deployed military force:

> Even if a contractor performs in accordance with the contract, the contractor may be vulnerable to claims that services in support of a war effort are inherently risky. Poor performance of systems support services (e.g., calibrating a weapon) could result in casualties or fatalities involving the military members using those weapons as well as unintended civilians. Air Force General Counsel Guidance Document Deploying with Contractors: Contracting Considerations, November 2003, at 9.

Under current circumstances, particularly in Iraq, commercial liability insurance is still often unavailable, insufficient or unreasonably expensive. In addition, many commercial policies often exclude "war risks" or risks associated with terrorist activities. Furthermore, as we know from PSC's continuing work in this area, insurance companies are increasingly concerned about their ability to insure against the full range of risks associated with performing work in an area that is experiencing violence against U.S. military forces, contactor personnel and the local citizenry. The increasing number of well publicized lawsuits filed in the U.S. by third parties against contractors alleging wrongful death supports the concerns of both contractors and insurance companies.

If commercial liability insurance is insufficient, unaffordable or unavailable to contractors (and particularly to those performing fixed-price work) the number and quality of the contractors willing to accept such financial risks will decline. Boards of Directors, corporate officers, and audit committees, particularly of publicly traded companies, will decide that they cannot assume the full risk of a potential, catastrophic incident and may decline to pursue such work. As a result, the DoD and other federal agencies will lack full access to the depth of experience and resources these contractors could otherwise provide; it could lead to reduced competition for those opportunities and potentially increased cost of performance.

Providing contractors with indemnification under Public Law 85-804 is an available solution, but that approach is viewed by many inside and outside of DoD as too burdensome or unpredictable, and certainly not consistently applied across a broad range of even related circumstances. Thus, while Public Law 85-804 remains a viable potential strategy to address the risk of third-party liability under fixed-price contracts on a case-by-case basis, we are not suggesting that DoD consider using that indemnification authority to address the concerns raised here.

We believe a less burdensome and more expedient remedy to address these liability concerns is to tailor the existing FAR clause to provide contractual indemnification under fixed--price contracts. As you know, contractors performing under *cost reimbursement* contracts are entitled to have included in their contract the clause at FAR 52.228-7 titled "Insurance – Liability to Third Persons." That clause requires contractors to maintain a specified level of insurance and provides government indemnification for certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise. Since an increasingly large percentage of a contractor's cost is attributable to insurance and "reserves" for self-

insurance, in these fixed-price circumstances, it may be more economical for the U.S. to rely on its self-insurance through contractual indemnification for amounts not covered by a company's commercial insurance or otherwise.

Conclusion

Hiring private security is common in overseas operations. Iraq is not new in that regard. However, the magnitude of the work and the concurrent operations taking place there create the unique challenges we see. But any solution must be approached carefully and with full consultation to address the real issues without creating new problems. PSC would welcome the opportunity to work with the Committee and others on these important policy matters.

Thank you for the opportunity to provide this information. I would be pleased to respond to your questions.

STATEMENT REQUIRED BY HOUSE RULES

In compliance with House Rules and the request of the Committee, in the current fiscal year or in the two previous fiscal years, neither I nor the Professional Services Council, a non-profit 501(c)(6) corporation, has received any federal grant, sub-grant, contract or subcontract from any federal agency.

BIOGRAPHY

Alan Chvotkin is Senior Vice President and Counsel of the Professional Services Council, the principal national trade association representing the professional and technical services industry. PSC is known for its leadership in the full range of acquisition, procurement, outsourcing and privatization issues.

Mr. Chvotkin joined PSC in November 2001. He draws on his years of government and private sector procurement and business experience to facilitate congressional and executive branch knowledge of and interest in issues facing PSC's membership. Previously, he was the AT&T vice president, large procurements and state and local government markets, responsible for managing key AT&T programs and opportunities. Earlier at AT&T, he was vice president, business management, responsible for the government contracts, pricing, compliance and proposal development organizations. From 1986 to 1995, he was corporate director of government relations and senior counsel at Sundstrand Corporation. Mr. Chvotkin also was a founding member of industry's Acquisition Reform Working Group.

Before joining Sundstrand, Mr. Chvotkin spent more than a dozen years working for the U.S. Senate. He first served as professional staff to the Senate Budget Committee and to the Senate Governmental Affairs Committee. He became counsel and staff director to the Senate Small Business Committee, and then counsel to the Senate Armed Services Committee.

He is a member of the Supreme Court, American and District of Columbia Bar Associations. He is also a member of the National Contract Management Association and serves on its national board of advisors and as a "Fellow" of the organization. Alan is also a "Fed 100" winner. He has a law degree from The American University's Washington College of Law, a master's in public administration and a bachelor's in political science.